Waters of the United States/Clean Water Act: Associated General Contractors of America Comments on U.S. EPA Proposed Rule

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The Associated General Contractors of America ("AGC") submitted January 5th comments to the United States Environmental Protection Agency and the United States Army Corps of Engineers (collectively, "Corps") on the proposed rule to revise the definition of "Waters of the United States" ("WOTUS"). See Docket (EPA-HQ-OW-2025-0322).

AGC describes itself as the nation's leading construction trade association representing more than 28,000 member firms which include construction contractor firms, suppliers and service providers across the nation, and has members involved in all aspects of non-residential construction.

The members are stated to be engaged in the construction of the nation's public and private buildings, shopping centers, factories, warehouses, highways, bridges, tunnels, airports, water works facilities and multi-family housing units, and prepare sites and install the utilities necessary for housing developments.

The Corps in announcing the proposed revisions to the WOTUS stated that the intent included:

- Amending the definition of "waters of the United States" ("WOTUS") in light of the United States Supreme Court's 2023 decision in *Sackett v. Environmental Protection Agency.*
- Provide greater regulatory certainty/predictability/consistency by clarifying the definition of WOTUS.
- Implement the overall objective of the Clean Water Act to restore and maintain the quality of the Nation's waters while respecting State and Tribal authority over their own land and water resources.

The Trump Administration has sought to narrow aspects of the Biden-era rulemaking addressing this definition in regard to a determination of Sackett's outline of when adjacent wetlands are jurisdictional.

EPA states by way of introduction to the proposed rule that in September 2023, the agencies issued a final rule without notice and comment amending the regulations defining WOTUS to conform to the Supreme Court's Sackett decision. They state that numerous concerns raised by stakeholders about the Amended 2023 Rule, including that the Amended 2023 Rule does not adequately comply with the Supreme Court's interpretation in Sackett of the scope of Federal jurisdiction under the Act as well as identifying implementation-related issues.

The agencies argue that in this proposed rule they are revising the 2023 rule to:

- Implement the *Sackett* decision.
- Provide greater regulatory certainty.

- Increase Clean Water Act program predictability and consistency.

By way of introduction, AGC's comments state that the trade association generally supports the agencies' proposed approach. However, it recommends targeted improvements to what it describes as "key areas." These are stated to include areas where it argues the agency should go further to provide clarity and to prevent non-jurisdictional features from being caught up during case-by-case implementation.

Key parts of the comments include:

- CONTRACTORS NEED A WORKABLE AND ENDURING DEFINITION.
- The Clean Water Act Provides Guardrails for the Agencies.
- The Clean Water Act's use of the plural term 'waters' encompasses 'only those relatively permanent, standing, or continuously flowing bodies of water described in ordinary parlance as 'stream, oceans, rivers, and lakes.
- The Clean Water Act's intentional and repeated use of the term "navigable" is an important guardrail.
- The statute is best read to capture only waters with relatively permanent flow.
- AGC RECOMMENDATIONS ON EXCLUSIONS.
- Reinstate the Exclusion for Stormwater Control Features.
- Reinstate the Exclusion for Ephemeral Features.
- Strengthen the Ditch Exclusion.
- AGC RECOMMENDATIONS ON OTHER PROPOSED ACTIONS.
- Categorical Waters.
- Key Definitions within the Proposal.
- Tributary.
- Relatively Permanent (and the Wet Season).
- Continuous Surface Connection.
- Ditch.
- Small Business Concerns.

A copy of the AGC comments can be found here.